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# **Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress**

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## Summary

The responsibility for populating top positions in the executive and judicial branches of government is one the Senate and the President share. The President nominates an individual, the Senate may confirm him, and the President would then present him with a signed commission. The Constitution divided the responsibility for choosing those who would run the federal government by granting the President the power of appointment and the Senate the power of advice and consent.

Several hundred people go through the appointments process each year. Prior to the adoption of the measures discussed in this report, there were approximately 1,200-1,400 positions in the executive branch requiring the Senate's advice and consent. The pace of the appointment and confirmation processes has been the subject of a series of critical reports and proposals for change. Critics believe that the executive branch vetting, and/or the confirmation process in the Senate, is too long and difficult and discourages people from seeking government office. Others, however, contend that most nominations are successful, suggesting that the process is functioning as it should, and that careful scrutiny of candidates is appropriate.

During the 112<sup>th</sup> Congress, a bipartisan group of Senators crafted two measures they contend will make the appointment process easier and quicker. Both measures were adopted.

P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act of 2011, removed the requirement for Senate confirmation for appointees to 163 positions, authorizing the President alone to appoint certain officials. Originally introduced into the Senate in March 2011 as S. 679, the Senate passed an amended version of the bill by a vote of 79-20 on June 29, 2011. The House of Representatives passed the Senate's version of the bill under suspension of the rules on July 31, 2012. President Barack Obama signed the bill into law on August 10, 2012. Parts of the act took effect immediately, and other parts took effect on October 9, 2012, 60 days after its enactment.

P.L. 112-166 contains two major provisions. The first eliminated the requirement for the Senate's advice and consent on nominations to 163 positions in the executive branch. This provision of the law took effect on October 9, 2012. Members who supported the bill during its consideration have stated that the reduction in the number of positions subject to the Senate's advice and consent will ease the Senate's workload on processing nominations.

The second major provision of P.L. 112-166 established a working group to examine the appointments process. The working group is required to write two reports that are expected to generate a number of recommendations. The first, which is required to be submitted by November 8, 2012, is to make recommendations on how to streamline the collection of paperwork required of nominees. The second report, which is required to be submitted by May 3, 2013, is to examine whether the background investigations currently conducted of nominees can or should be improved.

S.Res. 116, a resolution "to provide for expedited Senate consideration of certain nominations subject to advice and consent," established a potentially faster Senate confirmation process for nominees to an additional 272 positions. On June 29, 2011, the Senate agreed to an amended version of S.Res. 116, by a vote of 89-8. The provisions of S.Res. 116 are now a standing order of the Senate and took effect for nominations received after August 28, 2011.

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**T**he responsibility for populating top positions in the executive and judicial branches of government is one the Senate and the President share. The President nominates an individual, the Senate may confirm him, and the President would then present him with a signed commission. The Constitution divided the responsibility for choosing the most senior leaders who run the federal government. Article II, Section 2 says that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Sharing the process for appointing and confirming nominations can pose challenges to the President and the Senate, and it has sometimes been the focus of significant tension between the branches. Currently, hundreds of people go through the appointment and confirmation process each year. The pace of the appointment and confirmation processes has been the subject of a series of reports and proposals, with many critics charging that the vetting by the executive branch is excessive or that the confirmation process by the Senate is too long and difficult, which discourages people from seeking government service.

During the 112<sup>th</sup> Congress, a bipartisan group of Senators crafted two measures they contend will make the appointment process easier and quicker. Both measures were adopted.

P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act of 2011, removed the requirement for Senate confirmation for appointees to 163 positions, empowering the President alone to appoint the official. Originally introduced into the Senate in March 2011 as S. 679, the Senate passed an amended version of the bill by a vote of 79-20 on June 29, 2011. The House of Representatives passed the Senate's version of the bill under suspension of the rules on July 31, 2012. President Barack Obama signed the bill into law on August 10, 2012. Parts of the act took effect immediately, and other parts took effect on October 9, 2012, 60 days after its enactment.

S.Res. 116, a resolution "to provide for expedited Senate consideration of certain nominations subject to advice and consent," established a potentially faster Senate confirmation process for a second group of nominees. On June 29, 2011, the Senate agreed to an amended version of S.Res. 116, by a vote of 89-8. The provisions of S.Res. 116 are now a standing order of the Senate and took effect for nominations received after August 28, 2011.

This report provides a brief background on advice and consent issues, an overview of the appointment process in both the executive and legislative branches, and a brief discussion of recent concerns about the system. Next, the report explores the events in the 112<sup>th</sup> Congress leading up to the introduction and passage of P.L. 112-166 and S.Res. 116, and it concludes with an analysis of the two measures.

This report does not discuss the nomination and confirmation of federal judges, which are not covered by the two measures introduced.<sup>1</sup>

## **Background: Advice and Consent**

While the Constitution includes the Senate in the confirmation process, it does not spell out how the chamber should fulfill its stated role of providing advice and consent to a nomination. The

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<sup>1</sup> For more information on issues involving the confirmation process of federal judges please see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus.

extent of legislative and executive control of the process has in many respects remained undetermined, and there has been debate since the earliest days of the country over how the Senate has chosen to exercise its responsibilities.

Some have asserted that the Senate should have a co-equal role with the President in the process.

The Senate's responsibility for confirming presidential nominees, although fixed firmly in the Constitution, remains unsettled in its application. The Senate was not meant to be a passive participant. Delegates to the Philadelphia convention believed that the Senate would be knowledgeable about nominees and capable of voting wisely. Yet, for the most part, it has acted cautiously, uncertain of the scope of its own constitutional power. The source of this uncertainty is not the Constitution. Nowhere in that document, or in its history, is there an obligation on the part of the Senate to approve a nomination. On the contrary, the burden should be on the President to select and submit a nominee with acceptable credentials.<sup>2</sup>

Others have said that the Senate should allow the President greater leeway in his choices for office than is currently the case. For example, law professor John C. Eastman told the Senate Rules Committee on June 5, 2003, that

... the appointment power is located in Article II of the Constitution, which defines the powers of the President, not in Article I, which defines the powers of the legislature. As the Supreme Court itself has noted, by vesting appointment power in Article II, the framers of our Constitution intended to place primary responsibility for appointments in the President. The "advice and consent" role for the Senate, then, was to be narrowly construed.<sup>3</sup>

The practice of the Senate, however, has not systematically reflected either of these perspectives. Historically, the nomination and confirmation of presidential appointments has been regulated not by strict, formal rules, but rather by informal customs that can change (and have changed) over the years, as the relative balance of power between the President and the Senate ebbs and flows. It is these customs which form the process, according to appointments expert Michael J. Gerhardt.

These informal arrangements—those not clearly required or clearly prohibited by the Constitution—have come to define the dynamic in the federal appointments process. The informal arrangements through which the system operates—including senatorial courtesy; logrolling; individual holds, "blue slips;" consultation between presidents, members of Congress, and other interested parties, including judges; interest group lobbying; strategic leaking by administrations, senators and interest groups; manipulation of the press; the media's effort to influence the news; and nominees' campaigning—are the sum and substance of the federal appointments process. Studying these arrangements provides even greater illumination than studying Supreme Court decisions or the Constitution itself of how the different branches of the federal government interact on matters of mutual concern.<sup>4</sup>

Under these informal customs, individual Senators have, historically, been deeply involved in the nomination and confirmation process. The procedures and traditions that have developed have

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<sup>2</sup> Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Lawrence, KS: University Press of Kansas, 1997), p. 38.

<sup>3</sup> Testimony of Professor Eastman, in U.S. Congress, Senate Committee on Rules and Administration, Senate Rule XXII and Proposals to Amend This Rule, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website, <http://rules.senate.gov/public/index.cfm?p=CommitteeHearings>.

<sup>4</sup> Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), p. 338.

tended to protect the autonomy of individual Senators to choose how to fulfill the advice and consent role, rather than to dictate the process for all Senators.

It is this combination—unwritten Senate traditions and the protection of each Senator's rights—that has led critics to call for changes in the legislative branch's process. "[T]he Senate's confirmation process is entirely consistent with all of its other norms, traditions and rules. Concern for the rights and prerogatives of individual senators gives rise to numerous opportunities for obstruction and delay," argued political scientists Nolan McCarty and Rose Razaghian.<sup>5</sup>

On the other hand, as congressional scholar Sarah Binder noted, "Most presidential nominees emerge from the Senate confirmation process and are eventually confirmed."<sup>6</sup> In the 111<sup>th</sup> Congress, for example, the President submitted 964 nominations to executive branch positions, and 843 of those were eventually confirmed for an 87% success rate.<sup>7</sup>

The 112<sup>th</sup> Congress has made some changes to the appointments process, which will be discussed throughout the remainder of this report. This was not the first time in recent years that the appointments process has been addressed. Changes to the appointments process during presidential transitions were included in the Intelligence Reform and Terrorism Prevention Act of 2004, for example.<sup>8</sup> Those changes, following recommendations from the 9/11 Commission, were intended to expedite the presidential appointments process during presidential transitions. It is unclear whether these changes were successful in achieving that goal.<sup>9</sup>

## **The Executive Branch Process: Selection, Clearance, and Nomination**

The appointment process begins with the President (or the President-Elect). Initial selection and preliminary vetting is done by the White House Office of Presidential Personnel (OPP). OPP is located within the White House, which allows the President to be personally engaged in personnel decisions and in the selection of nominees.

Members of Congress and interest groups sometimes may recommend candidates for specific advice and consent (PAS) positions to the President.<sup>10</sup> They may offer their suggestions by letter, for example, or by contact with a White House liaison. The White House is under no obligation to follow such recommendations.

Once a nominee has been selected, other executive branch entities become involved in the vetting process.<sup>11</sup> The Office of Counsel to the President oversees the clearance of nominees, which often

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<sup>5</sup> Nolan McCarty and Rose Razaghian "Advice and Consent: Senate Responses to Executive Branch Nominations, 1885-1996," *American Journal of Political Science*, vol. 43, no. 4 (October 1999), p. 1125.

<sup>6</sup> Sarah A. Binder, "The Senate as a Black Hole: Lessons Learned from the Judicial Appointment Experience," *The Brookings Review*, vol. 19, spring 2001, p. 37.

<sup>7</sup> Analysis done by CRS using the nominations database of the Legislative Information System.

<sup>8</sup> P.L. 108-458.

<sup>9</sup> See CRS Report R40119, *Filling Advice and Consent Positions at the Outset of a New Administration*, by Henry B. Hogue, Maureen Bearden, and Betsy Palmer.

<sup>10</sup> For an extensive historical study of the pre-nomination process and the level of cooperation between the President and Congress, see Mitchell A. Sollenberger, *The President Shall Nominate: How Congress Trumps Executive Power* (Lawrence, KS: University Press of Kansas, 2008).

<sup>11</sup> The selection and vetting process is slightly different for judicial appointees, which are not covered in this report. For

includes further investigations performed by the Federal Bureau of Investigation (FBI), Internal Revenue Service (IRS), Office of Government Ethics (OGE), and an ethics official for the agency to which the candidate is to be appointed. During the selection and vetting process, the candidate submits several forms, including the “Public Financial Disclosure Report” (Standard Form (SF) 278), the “Questionnaire for National Security Positions” (SF 86), and the White House “Personal Data Statement Questionnaire.” If the background investigation reveals a conflict of interest, OGE and the agency ethics official may work with the candidate to mitigate the conflict.

The selection and initial vetting process concludes after the Office of Counsel to the President has cleared the candidate. Once the candidate is cleared, the President submits the nomination to the Senate.

## The Legislative Branch Process: Confirmation

Rule XXXI of the Senate’s standing rules sets out the basics of the confirmation process in the Senate (though it is critical to note that almost any requirement of Rule XXXI can be and frequently is set aside or altered by a unanimous consent agreement among all Senators).<sup>12</sup>

The following discussion of the Senate’s process does not include the provisions of S.Res. 116, as passed by the Senate on June 29, 89-8. The details of the resolution are discussed later in the report, in the subsection “Privileged Nominations, S.Res. 116.”

After the Senate receives the President’s nomination, the nomination is referred to a standing committee based on the committee’s jurisdiction. The committee may hold a hearing on the nomination (though this is not required) and also may report a nomination to the full Senate.

The decision by a committee to report a nomination is critical: to be considered on the Senate floor, the nomination must have been reported from the committee of jurisdiction or all Senators must agree to its consideration.<sup>13</sup>

The Senate’s committees perform an important information-gathering function on those nominated to top posts of the government. Each committee typically gathers biographical and financial information on each of the nominations it receives. The executive branch does not routinely provide the information it has gathered on the nominee to the Senate, so committees may have to do their own research. Sometimes, committees also review the results of an FBI investigation on the nominee. Most committees will not act on a nomination until all of this information is obtained; some formalize this by including in their rules a waiting period between the committee’s receipt of the nomination and committee action on it.<sup>14</sup>

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judicial positions, the FBI conducts a background check, and other entities such as Justice Department officials and/or White House aides investigate the candidate’s public record and background. For further information about the Supreme Court appointment process, see CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Steven Rutkus.

<sup>12</sup> For more on the confirmation process, please see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki, and CRS Report RL31948, *Evolution of the Senate’s Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer.

<sup>13</sup> A nomination that is without controversy may come to the Senate floor by a unanimous consent agreement to discharge the committee of jurisdiction. This is typically done when there is no desire on the part of any Senator to debate or contest the nomination on the floor.

<sup>14</sup> See, for example, the Senate Armed Services Committee rules for the 112<sup>th</sup> Congress, which require a seven day waiting period between receipt of the nomination and committee action on it. Senator Levin, “Committee on Armed Services Rules of Procedure,” Senate proceedings, *Congressional Record*, daily edition, vol. 158 (March 1, 2011), p.



Committees consider nominations at business meetings, also called markups. A majority of the committee must be physically present to report the nomination to the full Senate, and a majority must support the motion to report the nomination.<sup>15</sup> Typically, committees do not write reports on nominations, as they may do with legislation reported from committee.

Nominations reported by a committee are placed on the Senate's *Executive Calendar*,<sup>16</sup> and must lay over one day before the full Senate may act on them. A simple majority vote, a quorum being present, is required to confirm a nomination, but, if there is significant opposition, supporters of a nomination may first need to win a super-majority vote to end debate (60 votes) before the simple majority confirmation vote can take place.

The majority leader is responsible for setting the agenda for the Senate, including scheduling debate and votes on nominations. Although the motion to consider a nomination is typically not debatable, the nomination itself is subject to debate. That means Senators who are opposed to a nomination may prevent the Senate from taking a final vote on it by means of extended debate. The only recourse the majority leader has to force an end to the debate on a nomination is to use the cloture process, which would then require the support of 60 Senators to end the debate and vote on the confirmation of the nomination.<sup>17</sup>

The vast majority of the Senate's business, however, especially on nominations, is conducted pursuant to a unanimous consent (UC) agreement. A UC agreement establishes the procedural blueprint for consideration of a measure or matter. It must be agreed upon by all Senators to take effect. For example, a UC on a nomination might set a date and time the Senate will begin debate on it and perhaps include a specific time length for the debate, three hours. Such a UC, if agreed to by the Senate, would preclude a Senator from delaying the final vote by extended debate.<sup>18</sup>

When a Senator informs his or her party leader that they would object to a unanimous consent agreement to debate and vote on a nomination, this is typically referred to as a "hold." Absent a unanimous consent agreement, the majority leader may decide not to bring up a nomination even though a majority of the Senate may support the nominee, because the Senate would have to spend several days of session to end debate and get to the confirmation vote.<sup>19</sup>

Even after a committee reports a nomination, lack of floor action may send the process back to the beginning. Anytime the Senate is in a recess of more than 30 days, all nominations not yet confirmed are to be returned to the President. If the President still desires to fill the jobs with the people he had chosen, he must resubmit the nominations to the Senate, and they all must go through the committee process, even those that the committees had previously reported.

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<sup>15</sup> Committees have three options for reporting nominations. They may report them favorably, unfavorably, or without recommendation. In practice, if a committee decides to vote on a nomination, the recommendation is almost always to report favorably. If the committee did not want the nominee confirmed, it is more likely to just not act than to report the nomination unfavorably or without recommendation. The main exceptions to this practice are Supreme Court nominations. It has been the tradition of the Committee on the Judiciary to report out nominees to the high court, even if the committee is not in favor of their ultimate confirmation.

<sup>16</sup> The *Executive Calendar* lists all nominations and treaties available for floor action.

<sup>17</sup> This statement assumes there is no more than one vacancy in the Senate. For more on the cloture process and the time needed to file and consider cloture motions, please see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth, Valerie Heitshusen, and Betsy Palmer.

<sup>18</sup> For more on the unanimous consent process, see CRS Report 98-225, *Unanimous Consent Agreements in the Senate*, by Walter J. Oleszek.

<sup>19</sup> For more on holds, see CRS Report 98-712, *"Holds" in the Senate*, by Walter J. Oleszek.



At any of the above stages, the Senate may alter how the process works if all Senators agree. For example, some nominations for Cabinet secretaries do not get referred to committee and may be considered by the Senate the same day they are received. Or Senators may agree not to refer a nomination to committee (and perhaps allow its immediate consideration on the floor) or to discharge the nomination from the committee and agree to its immediate confirmation.

Frequently, before the annual August recess, the Senate agrees to a unanimous consent agreement that prevents all but a few nominations from returning to the President, despite the requirements discussed above.

There is no requirement that either the committee or the Senate act on a nomination they receive. In fact, the most common way a nomination fails to be confirmed is through lack of action: either the committee never takes up the nomination or the Senate fails to consider it, despite committee action.

## Recent Concerns over the Appointment and Confirmation Process

The President's ability to fill advice and consent positions has been a topic of study by many individuals and organizations, especially in recent years. Many of these studies have raised concerns regarding the process.

For example, the National Commission on the Public Service, also known as the Volcker Commission, released a report in 2003 in which it discussed "the presidential appointee problem." The report identified a two-part problem: (1) an increase in the number of PAS positions and (2) a general slowing of the appointments process due to greater scrutiny applied during the vetting processes in both the executive and legislative branches.

Contemporary presidents face two daunting difficulties in filling the top posts in their administrations: the number of appointments is very large, and the appointments process is very slow... The time required to fill each of these positions has expanded exponentially in recent decades... In part, this results from the more thorough and professional recruitment procedures employed by recent administrations. But most of the elongation of the appointments process is the consequence of a steady accumulation of inquiries, investigations, and reviews aimed at avoiding political embarrassment. These include extensive vetting, lengthy interviews, background checks, examinations of government computer records, completion of questionnaires and forms composed of hundreds of questions, FBI full-field investigations, public financial disclosure, and conflicts of interest analysis. Much of the process is duplicated when a nomination goes to the Senate and is subjected to the confirmation process.<sup>20</sup>

## Number of PAS Positions

Prior to the enactment of the Presidential Appointment Efficiency and Streamlining Act, the number of PAS positions in the executive branch was approximately between 1,200 and 1,400 positions.<sup>21</sup> As discussed later in this report, the enactment of the Presidential Appointment

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<sup>20</sup> The National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century*, January 2003, p. 18, available at <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>.

<sup>21</sup> The precise number of PAS positions is difficult to identify. Various sources provide different estimates of the number. CRS primarily uses the *Plum Book* for data on the total number of PAS positions, although some errors have been identified in the *Plum Book's* data. Though the publication is usually referred to as the *Plum Book*, the official

Efficiency and Streamlining Act reduced the total number by 163 positions (for a detailed discussion of the law, see section below entitled “The Presidential Appointment Efficiency and Streamlining Act of 2011”). According to data from the most recent edition of the *Plum Book*, as of 2008, the number of executive branch PAS positions had increased by approximately 365 since the outset of the Kennedy Administration. Most of this increase can be attributed to the creation of new departments and agencies with PAS positions over that time period. For example, the Departments of Transportation, Energy, Education, and Homeland Security all have a number of PAS positions; other agencies created during that period with PAS positions include the Environmental Protection Agency, the Federal Election Commission, and the Consumer Product Safety Commission. Additionally, existing agencies saw a gradual increase in the number of PAS positions.<sup>22</sup>

A majority of all advice and consent positions are full-time positions, including those within Cabinet departments, independent agencies, and independent regulatory agencies. Part-time advice and consent positions consist mostly of seats on various boards and commissions.

## Length of the Vetting Process

The second part of the “appointee problem,” as identified by the Volcker Commission, is the extensive nature of the background checks for presidential nominees. As discussed above, there are several executive branch entities involved in the background check process, including the White House, OGE, and the FBI. Any information that is overlooked during a background check and surfaces later can be potentially embarrassing to a President, so it is in the President’s interest to have a very thorough vetting process for nominees. As a result, the scrutiny that has been applied to nominees has increased over time, according to a former director of presidential personnel, with candidates often answering similar questions at least two or three times.<sup>23</sup> In addition, as a result of the increase in the number of PAS positions the President has to fill, the selection process has slowed.<sup>24</sup> Thus, before the President even sends a nomination to the Senate, the selection and vetting of that nominee may be time consuming.

The background checks for nominees are essentially restarted once the nomination is sent to the Senate, since it appears that the President tends not to share the background information with the

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citation for this edition is U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *United States Government Policy and Supporting Positions*, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., committee print, November 12, 2008 (Washington: GPO, 2008). The *Plum Book*-based estimate of 1,200 to 1,400 includes full-time and part-time positions in the executive branch. It does not include positions that are typically considered to be routine nominations, including officer corps positions in the civilian uniformed services of the National Oceanic and Atmospheric Administration in the Department of Commerce; members of the Public Health Service in the Department of Health and Human Services; members of the officer corps in the military services; and some positions in the Foreign Service.

<sup>22</sup> Although there is often a general sense that the number of PAS positions steadily increases over time, the number is fluid. Occasionally, some PAS positions are eliminated, or have their advice and consent requirement removed. For example, 15 examiners-in-chief in the U.S. Patent Office had the advice and consent requirement removed from their positions in 1975. PAS positions were also eliminated in 1965 when a reorganization of the Customs Service eliminated 53 collectors-of-customs positions. The enactment of P.L. 112-166 also reduced the number of PAS positions. However, on the whole, observers of the confirmation process are correct to point to an increase in the total number of positions over time.

<sup>23</sup> Testimony of Clay Johnson III, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Eliminating the Bottlenecks: Streamlining the Nominations Process*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 2, 2011.

<sup>24</sup> James P. Pfiffner, “Presidential Appointments: Recruiting Executive Branch Leaders,” in *Innocent Until Nominated: The Breakdown of the Presidential Appointments Process*, ed. G. Calvin Mackenzie (Washington, DC: Brookings Institution Press, 2001), p. 51.

Senate. The Ethics in Government Act requires OGE to give an ethics report to the appropriate committee of jurisdiction for each nomination.<sup>25</sup> The ethics report includes one of the standard forms for financial disclosure, as well as an ethics agreement describing potential conflicts of interest. Senate committees often request additional information since there is minimal cross-branch coordination with regard to background information.<sup>26</sup>

## **Presidential Transitions**

Particularly during the time of a presidential transition, delays can occur while a new President or President-Elect's team selects its nominees, because new Presidents have the responsibility of filling leadership positions that are vacated at the end of the previous administration. This includes hundreds of positions in Cabinet departments and many positions in other independent agencies, such as the Environmental Protection Agency and the Central Intelligence Agency. A large number of vacancies, especially during a party turnover transition, can lead to a bottleneck in the selection and vetting process.<sup>27</sup>

Some studies have identified the appointments process during presidential transitions as particularly problematic. For example, the Obama Administration's transition, according to a 2010 study, started out well-organized and well-financed. After the inauguration, however, issues such as "a shift in personnel directors from the transition to the White House, Senate delays, a decision to stiffen vetting requirements following nominee tax issues and other problems" slowed the President's rate of filling his Administration.<sup>28</sup>

Other recent events have also highlighted some characteristics of the duration of the presidential appointments process. The 9/11 Commission identified several Cabinet positions that were still vacant during the first few months of the George W. Bush Administration, suggesting that the President's delayed ability in getting his team together may have compromised some national security policymaking in those first few months of the new Administration. Because of the delayed election results after the election of 2000, the Bush Administration was at a particular disadvantage for filling vacant positions in a timely manner.<sup>29</sup>

There may be several consequences of a slow appointments process. For example, a slow appointments process may have a negative effect on the new President's ability to govern. One study suggested that a high number of vacancies at the outset of a new President's Administration can contribute to a lag in agency productivity: "These delays in agency staffing have detrimental consequences. Without political appointees, regulation and enforcement actions have lagged."<sup>30</sup>

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<sup>25</sup> 5 U.S.C. app. §103(c).

<sup>26</sup> Testimony of Clay Johnson III, U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Eliminating the Bottlenecks: Streamlining the Nominations Process*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., March 2, 2011. pp. 8-10.

<sup>27</sup> For more information on filling presidential administrations during transition years, see CRS Report R40119, *Filling Advice and Consent Positions at the Outset of a New Administration*, by Henry B. Hogue, Maureen Bearden, and Betsy Palmer.

<sup>28</sup> Partnership for Public Service, *Ready to Govern: Improving the Presidential Transition*, Washington, DC, January 2010, p. 1, available at <http://www.ourpublicservice.org/OPS/publications/viewcontentdetails.php?id=138>.

<sup>29</sup> U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), p. 198. The 2000 election was held on November 7, 2000, but the results were not definitive until the Supreme Court ruled in *Bush v. Gore* and Vice President Al Gore conceded the election on December 12, 2000 (*Bush v. Gore*, 531 U.S. 98 (2000)). The 36-day delay cut the normal transition period approximately in half.

<sup>30</sup> Anne Joseph O'Connell, *Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process*, Center for American Progress, April 2010, p. 3, [http://www.americanprogress.org/issues/2010/04/pdf/dww\\_appointments.pdf](http://www.americanprogress.org/issues/2010/04/pdf/dww_appointments.pdf).

The same report also suggested that vacancies in Senate-confirmed positions may give a higher level of influence within the President's administration to some presidential advisors who are not subject to advice and consent.<sup>31</sup> Others have suggested that the President may use recess appointments to circumvent the Senate's confirmation process, which has met some criticism from some Members of Congress.

## **Changes to the Appointments Process Adopted by the 112<sup>th</sup> Congress**

The 112<sup>th</sup> Congress began in the Senate with a robust debate over changing its rules, and it was this debate that led to the adoption of changes to the appointments process. "What has happened this time is a result of the discussion we had earlier in the year about making the Senate a more effective place to work," said one Senator who was involved.<sup>32</sup>

In particular, some Senators, frustrated with the pace of the Senate and the ease with which a minority of Senators can block or stall a bill or nomination, proposed a series of changes designed to make it harder to wage a filibuster. Senators debated placing new limits on floor debate or imposing new restrictions on the ability of any Senator to hold the floor at length.

The Senate considered its confirmation process for presidential nominations as a part of this larger debate on its rules and the conduct of its business. As with most other business in the Senate, a determined opposition in the Senate can force the majority to expend time to confirm a nomination, even if there is overwhelming support for the nominee within the Senate. The majority leader may decide that, while the nomination has majority support, he is unwilling to spend perhaps as many as three days of Senate sessions to confirm one nomination.

At the end of the debate on its rules, the Senate approved a change designed to prevent Senators from being able to place a "hold" on a nomination (or measure) anonymously (S.Res. 28). Senators also informally agreed to examine the confirmation process. An informal group of Senators, led by of Rules and Administration Committee Chair Senator Charles Schumer, and the committee's ranking Republican Senator Lamar Alexander, met and, after extensive negotiations, came up with two measures, S. 679 and S.Res. 116, that were designed to take away some of the confirmation burden on the Senate in some cases while speeding up the process in others. Both measures were adopted and are discussed below.

## **The Presidential Appointment Efficiency and Streamlining Act of 2011**

This section outlines the objectives and provisions of P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act of 2011, and analyzes the law's contents. P.L. 112-166 was signed by President Obama on August 10, 2012.

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<sup>31</sup> Ibid., and William A. Galston and E.J. Dionne, Jr., *A Half-Empty Government Can't Govern: Why Everyone Wants to Fix the Appointments Process, Why It Never Happens, and How We Can Get It Done*, Brookings Institution, Washington, DC, December 14, 2010, p. 2, available at [http://www.brookings.edu/~media/Files/rc/papers/2010/1214\\_appointments\\_galston\\_dionne/1214\\_appointments\\_galston\\_dionne.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/1214_appointments_galston_dionne/1214_appointments_galston_dionne.pdf).

<sup>32</sup> Sen. Lamar Alexander, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1986.

## **Provisions of the Presidential Appointment Efficiency and Streamlining Act**

The main objective of the Presidential Appointment Efficiency and Streamlining Act, as identified by its sponsor and co-sponsors when it was introduced, was to make the presidential appointments process more efficient.<sup>33</sup> To accomplish that goal, the law contained two major provisions. The first identified 163 positions and eliminated the requirement for advice and consent of the Senate in the President's appointments to those positions. The second provision required the establishment of a working group to make recommendations to speed up the vetting of nominees.

When Congress establishes a federal agency, it designates which positions in that agency (if any) will be subject to advice and consent. For example, in the Homeland Security Act of 2002 that established the Department of Homeland Security, the section of the law that established the position of Secretary read as follows: "There is a Secretary of Homeland Security, appointed by the President, by and with the advice and consent of the Senate."<sup>34</sup> Other statutes creating PAS positions have similar language. To remove the advice and consent requirements for the positions covered by P.L. 112-166, the legislation amended each section of the *U.S. Code* that established the 163 positions generally by striking the phrase "by and with advice and consent of the Senate." The President now has the ability to fill these positions without consulting the Senate. P.L. 112-166 converted the positions to "PA" positions, or presidentially appointed positions.<sup>35</sup>

The law's supporters have said that the positions listed in the law were not significant enough to necessitate Senate consideration, which is why they were chosen to be included. Many of the positions were assistant secretaries for administration or public affairs and other lower-level policy positions within agencies. Senator Alexander, one of the bill's co-sponsors, said on the Senate floor upon introduction of S. 679 that "these are the ones the Senate does not need to spend time on."<sup>36</sup> Senator Schumer also stated that "all of the positions covered in this proposal tend to be non-controversial and most closely resemble appointments that are currently made without Senate approval."<sup>37</sup> According to these and other floor statements on the bill, "Removing these positions from Senate confirmation will allow a new administration to be set up with more efficiency and speed, thus making government work better for the people."<sup>38</sup>

The section of P.L. 112-166 eliminating the advice and consent requirements from the 163 positions took effect 60 days after enactment, on October 9, 2012. Senate consideration of

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<sup>33</sup> For remarks made by several Senators during the bill's introduction, see *Congressional Record*, daily edition, vol. 157, part 44 (March 30, 2011), pp. S1985-S1990.

<sup>34</sup> §102, P.L. 107-296.

<sup>35</sup> According to the 2008 edition of the *Plum Book*, as of 2008, there were just over 300 PA positions, approximately 125 of which were full-time positions. Of the approximately 300 positions, a plurality of the positions were in the Executive Office of the President (116). Another 55 PA positions comprise the U.S. Holocaust Memorial Council, and the rest of the organizations with PA positions listed in the *Plum Book* have 15 or fewer PA positions. Other examples of organizations with PA positions include the Advisory Council on Historic Preservation (11 PA positions); the American Battle Monuments Commission (12 PA positions), the Architectural and Transportation Barriers Compliance Board (13 PA positions); the Christopher Columbus Fellowship Foundation (13 PA positions); the Committee for Purchase from People Who Are Blind or Severely Disabled (15 PA positions); and the Nuclear Waste Technical Review Board (11 PA positions).

<sup>36</sup> Sen. Lamar Alexander, remarks in the Senate, *Congressional Record*, daily edition, vol. 157, part 44 (March 30, 2011), p. S1986.

<sup>37</sup> Sen. Charles Schumer, remarks in the Senate, *Congressional Record*, daily edition, vol. 157, part 44 (March 30, 2011), p. S1988.

<sup>38</sup> *Ibid.*

nominations to those positions is no longer required. The President has the sole authority to appoint individuals to those positions.<sup>39</sup>

The second major provision of P.L. 112-166 established a working group to study the pre-nomination process. The goal of the working group is to help streamline the selection and vetting processes.

The working group is to be primarily composed of government officials representing several agencies that are involved in the vetting process. The chair is to be either the director of the Office of Presidential Personnel or another federal officer designated by the President. The President is also to appoint representatives from government agencies that are involved in the vetting process. The other members are to be appointed by the chair of the working group, and they are to be individuals who have relevant experience with the selection and vetting of nominees.

The working group is required to write two reports and to submit them to the President, the Senate Committee on Homeland Security and Governmental Affairs, and the Senate Committee on Rules and Administration. The first report, which is to be submitted within 90 days of the enactment of the law (by November 8, 2012), is to make recommendations for the streamlining of paperwork required for executive branch nominations. The report must include recommendations for instituting a "Smart Form," which would consolidate the information obtained during the vetting process into a centralized form. The form would be accessible to the executive branch entities that are involved in the vetting process and to the Senate, providing information more efficiently and cutting down on duplicative paperwork.<sup>40</sup>

The second report from the working group is to examine the background investigations that are currently required of nominees. This section of the law is predicated on the notion that not all nominees require the same level of scrutiny in their background checks. The legislation suggests varying the scope of the background investigation dependent upon the nature of the position for which the individual is under consideration. This second report is required within 270 days of the enactment of P.L. 112-166 (by May 5, 2013).<sup>41</sup>

Finally, P.L. 112-166 required the Government Accountability Office (GAO) to conduct a study and submit a report to Congress and the President. The report, which is required to be submitted by February 6, 2013, shall include information on the total number of PA positions in each agency, an evaluation of whether that number is necessary, and an analysis of whether such positions should be eliminated or converted to career positions.<sup>42</sup>

## **Implications of P.L. 112-166**

Supporters of P.L. 112-166 assert that the law will ease the Senate's workload on processing nominations by removing the advice and consent requirements for 163 positions.<sup>43</sup> The positions

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<sup>39</sup> At the time of writing, it is not yet clear how the implementation of the law will affect any nominations to these positions that are currently pending in the Senate.

<sup>40</sup> §4, P.L. 112-166.

<sup>41</sup> §4, P.L. 112-166. In addition, P.L. 112-166 established new requirements for the appointment of a Director of the Census, including certain qualifications that the appointee must possess, a five-year term, and a two-term limit for the position.

<sup>42</sup> §5, P.L. 112-166.

<sup>43</sup> The act also removes the advice and consent requirements for 319 members of the NOAA Officer Corps and 2,536 members of the Public Health Service. These nominations are usually considered to be noncontroversial and are usually considered *en bloc*, meaning that a few or even hundreds of individuals are listed and voted on in a single nomination.



are listed in **Appendix A**. They are mostly assistant secretary positions for administration or public affairs, along with some relatively lower-level policy positions within executive branch agencies. The inclusion of these groups of positions in the bill has simplified the overall attempt at reducing the number of advice and consent positions. Rather than targeting PAS positions within specific agencies or specific committees, the bill's sponsors chose to take a more systematic approach. This approach may have helped to garner more broad support within the Senate, especially from committee chairs whose committees had jurisdiction over these positions.

The 163 positions are distributed among 12 Senate committees, meaning that the enactment of P.L. 112-166 will save these committees the time they might have invested in processing nominations and performing background checks of nominees.

In addition, the reports required by P.L. 112-166 are expected to lead to a number of recommendations about how to speed up the selection and vetting process of nominees both at the executive branch, pre-nomination stage, as well as during the period of Senate consideration. The working group is to be composed of highly experienced and knowledgeable government officials who could potentially offer strong and useful recommendations on how to improve the process.

Some concerns over the legislation have been raised since its introduction. The remainder of this section discusses some of these issues.

### ***The Role of the Senate in the Appointments Process***

Some concerns have been raised regarding certain provisions of P.L. 112-166. One general concern has been whether it is in the Senate's interest to give up its advice and consent for these select positions. During debate on the bill, while proponents of the bill pointed to delay in the Senate and a heavy workload for Senate committees in dealing with nominations, some opponents defended the role of the Senate in oversight of the President and executive branch.

Article II, Section 2 of the Constitution grants the President the ability to appoint the principal officers of the United States, as well as some subordinate officers. Officers of the United States are those individuals serving in high-ranking positions that have been established by Congress and "exercising *significant authority* pursuant to the laws of the United States" (emphasis added).<sup>44</sup> The section above entitled "Background: Advice and Consent" discussed the tension between the President and the Senate over the appointments process. Those who wish to protect the Senate's role in the confirmation process may be concerned that the Senate would be giving up its role for 163 positions.

### ***Nature of the Positions Included in P.L. 112-166***

During debate on the bill, some Members expressed hesitation over some of the particular positions included in the bill that would no longer require the Senate's advice and consent, which was evident in the Senate's actions on the bill. Based upon statements made by the bill's supporters, it appears that the list of positions is composed primarily of positions that are seen as lower-level or administrative positions.<sup>45</sup>

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<sup>44</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). For further information on the distinction between officers and employees of the United States, as well as the distinction between principal and inferior officers, see CRS Report R40856, *The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight*, by Barbara L. Schwemle et al.

<sup>45</sup> For example, during the debate on final passage of S. 679, Senator Jay Rockefeller praised the decision to remove the chief financial officers (CFOs) from the bill, since "the CFO is a critical position." As reported by the Senate



One major category of positions included in the legislation was certain types of assistant secretaries. The bill's sponsors had said that these positions should not require Senate confirmation, and the President should be able to appoint those individuals immediately upon entering the White House to get the new Administration up and running. As one of the bill's cosponsors stated, "Many of these positions have little or no policy role, such as the Assistant Secretary for Legislative Affairs at the Department of Commerce, or are internal management or administration positions, such as chief financial officers or assistant secretaries for public affairs."<sup>46</sup>

The bill as reported removed the advice and consent role for assistant secretaries for public affairs and assistant secretaries for legislative affairs. Ultimately, assistant secretaries for legislative affairs were removed from the bill (as a part of a manager's amendment agreed to by voice vote), while assistant secretaries for public affairs remained in the bill.<sup>47</sup> As with the CFOs, which were also removed from S. 679, the legislative affairs positions were later added to S.Res. 116.

The other positions included in P.L. 112-166 appear to be positions that the sponsors of the legislation consider to be lower-level policy positions. For example, the law eliminated the advice and consent requirements for the Rural Utilities Service administrator and seven commissioners of the Mississippi River Commission.

## **Privileged Nominations, S.Res. 116**

As approved by the Senate on June 29, S.Res. 116 created a new process for Senate consideration of nominations to 272 positions in Cabinet agencies, certain oversight boards and advisory councils, and independent agencies.<sup>48</sup> These nominations now bypass formal committee consideration unless any single Senator objected to using the expedited process. The nominations originally included in this resolution tend not to be controversial and typically require little individual floor debate for confirmation. They must remain advice and consent positions because of the responsibilities of the boards and councils under the Appointments Clause of the

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Committee on Homeland Security and Governmental Affairs, the bill would have removed the advice and consent role for CFOs. The Senate, however, agreed to an amendment by voice vote to remove the CFO positions from S. 679, and later added them to the group of nominations to be given a new confirmation process by S.Res. 116. See Sen. Jay Rockefeller, remarks in the Senate, *Congressional Record*, daily edition, vol. 157, part 95 (June 29, 2011), p. S4178. Other individuals also had raised concerns over whether removing the advice and consent requirement would reduce the stature of CFOs within agencies. Linda Combs, who was CFO at the Department of Transportation during President George W. Bush's Administration, said that the "'PAS' gives you a credibility that you can potentially get as a career appointee, but you have to work awfully, awfully hard to get it." Others articulated similar concerns: that having chief financial officers who have the full respect of other agency employees is important in ensuring successful financial operations within agencies. Supporters of changing the CFO positions to PA positions said it would allow Presidents to "hit the ground running" while filling other positions at the beginning of a term. See Brian Friel, "Opponents of Confirmations Bill Fear CFOs Won't 'PAS' Status Test," *CQ Today Online News*, April 14, 2011.

<sup>46</sup> Sen. Susan Collins, remarks in the Senate, *Congressional Record*, daily edition, vol. 157, part 44 (March 30, 2011), p. S1988. See above footnote explaining that the CFO positions were later removed from the bill.

<sup>47</sup> One critic of the bill suggested that Congress may want to preserve its advice and consent role over those positions, since assistant secretaries for legislative and public affairs are those who are responsible for the agencies' interaction with Congress and the public. David S. Addington, "Speed Up Nominations and Confirmations, But Do Not Enact S. 679," the Heritage Foundation, April 1, 2011, p. 2, available at <http://report.heritage.org/wm3211>.

<sup>48</sup> With adoption of S.Res. 116 by the Senate on June 29, the provisions of the resolution are now a new standing order of the Senate; because it changes Senate rules, the resolution does not require action by the House or the President to take effect.

Constitution.<sup>49</sup> The positions added to the resolution during Senate floor debate do not have the same requirement.

In addition, many of the boards are structured to have a partisan political balance, and Senator Schumer said that retaining advice and consent over these positions allows the Senate to protect the bipartisan balance.<sup>50</sup>

S.Res. 116 was reported by the Senate Rules and Administration Committee on May 12, 2011; the full Senate amended and then agreed to the resolution on June 29, 89-8. The Senate agreed to a manager's amendment that added 39 positions to the list of those covered by the resolution (for the list of covered nominations, please see **Appendix B**). These positions had been included in the other nomination process bill (S. 679), and were moved by the Senate to S.Res. 116 to allow Senators to retain some of their control over the positions through the advice and consent process. Among those moved from one measure to the other are agency CFOs and assistant secretaries for legislative affairs.

### **Provisions of S.Res. 116**

Under the new process, once the Senate receives a nomination to one of those boards or councils from the President, it is placed on the Senate's *Executive Calendar*, in a new section called "Privileged Nominations." The nomination is not formally referred to committee, but the committee is asked to gather the biographical and financial information used to evaluate the nomination, as indicated by the column labeled "Information Requested."

Once the chair of the committee of jurisdiction notifies the Senate's executive clerk in writing that all the information requested had been received, the box labeled "Requested Information Received" is filled in with the date. The nomination will remain on this list for 10 days of session, after which it will move to the existing section called "Nominations" on the Calendar. Presumably, a nomination will not be eligible for floor consideration until it had moved to the "Nominations" section of the *Executive Calendar*, though the resolution does not specifically state this.

At any time after the receipt of a nomination and until it is placed on the "Nominations" section of the calendar, any Senator may request that the nomination be referred to committee, and not be considered using the new process. The nomination would then proceed using the existing confirmation process, beginning with referral to committee. In this way, the new system utilizes the existing practices of the Senate's unanimous consent process, where objection from even one Senator will prevent it from being used.

In addition, the Senate added a provision during floor consideration that requires any committee report on legislation that establishes any new position within an existing agency or department or a new agency or department that would be appointed by the President to contain a justification of any such new position.

These new procedures went into effect for nominations received 60 days after the Senate agreed to S.Res. 116, on August 28, 2011.

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<sup>49</sup> For a discussion of what kinds of positions require the Senate's confirmation, please see CRS Report R40856, *The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight*, by Barbara L. Schwemle et al. The discussion begins at the section entitled, "The Appointments Clause and Presidential Advisors."

<sup>50</sup> Sen. Charles Schumer, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1988.

## Implications of S.Res. 116

One of the biggest changes to come from adoption of the resolution likely will not be in the Senate's rules but in its expectations: with adoption of S.Res. 116 the Senate essentially agreed that, barring anything unusual, nominees to this group of positions should be confirmed relatively easily.

Supporters of the resolution said it would make for quicker, easier confirmation for the 272 positions covered. "This retains the authority of the Senate over these positions, but streamlines the process, lessening the burden on the Senate for routine, non-controversial nominations and providing for a faster road to confirmation as well," said one Senator upon introduction of the resolution.<sup>51</sup>

"We are confident this package will eliminate many of the delays in the current confirmation process," said resolution sponsor Senator Schumer. He noted that it is his expectation the nominations, once placed on the Nominations section of the *Executive Calendar*, would receive quick approval from the Senate: "The presumption for these part-time positions is, as I said, that they will be approved by unanimous consent and not be held up as a part of other battles or leverage or whatever else."<sup>52</sup>

By removing the committees' need to act on these nominations, the new process, it could be argued, might save the committees time. As students of the Senate know, a good deal of member and staff time is used before and during committee markups, business meetings where the committee would decide whether to report nominations to the full Senate. Senate rules require a majority of a committee to physically be present in order to report anything to the parent chamber, and, with the press of business on the Senate floor and in other committees, it can be difficult to schedule meetings efficiently. Time could also be saved if the committees did not need to hold hearings on any of the nominations in this group.

The committees retain the information gathering function, and are able to signal to other Senators their approval or disapproval of the nominations through informal discussions and floor speeches. The importance of the committee of jurisdiction in the process can be seen in the analysis of the nominations in the 111<sup>th</sup> Congress.

## *Nominations, 111<sup>th</sup> Congress*<sup>53</sup>

The resolution, as approved by the Senate Rules Committee in May 2011, specifies the 30 organizations and 244 positions that the measure, as reported, would cover. The positions included in this group are to boards of directors, advisory boards, and commissions, such as the Internal Revenue Service Oversight Board, the National Peace Corps Advisory Council or the Commission on Public Diplomacy.

During the 111<sup>th</sup> Congress, President Obama sent the Senate nominations to fill 76 of the 244 positions covered by the resolution as reported, roughly 31% of the positions.<sup>54</sup> One of those

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<sup>51</sup> Sen. Susan Collins, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1990.

<sup>52</sup> Sen. Schumer, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1988.

<sup>53</sup> This analysis does not include the 39 positions added to S.Res. 116 during Senate floor debate.

<sup>54</sup> That number of nominations is reflective of how many positions in this group came open during the 111<sup>th</sup> Congress. Many of the positions are term limited, and they may come open at various points during a President's Administration. The analysis of the nominations in this group in the 111<sup>th</sup> Congress is based on information in the Legislative Information Service (LIS) nominations database, available to the congressional community upon request at <http://www.congress.gov/nomis/>.

nominations was withdrawn. Of the remaining 75 nominations, 47 or 63% were confirmed, all by voice vote. The remaining 28 nominations were not confirmed and were returned to the President.<sup>55</sup>

Of the 47 confirmed nominations, all had been reported favorably from the committees of jurisdiction. Of the 28 unconfirmed nominations, none had been acted on by the committees of jurisdiction. So, all the nominations in this group that saw action by the committees to which they were referred were confirmed, and all those whose nomination was not acted upon by committees were not confirmed.

### ***Role of Committees and Single Senators***

The absolute correlation between committee action and confirmation in the data from the 111<sup>th</sup> Congress shows that the committee action did seem to play a central role in the fate of a nomination, though it is unclear whether the role was supportive (i.e., the Senate felt comfortable confirming a nomination that had received the endorsement of the committee), negative (i.e., the Senate could not act on a nomination if the committee was unwilling or unable to report it out), or a combination of both. It could also reflect an understanding on the part of the committee that the full Senate was unlikely to consider the nomination(s) and, therefore, that there was no benefit for the committee to report the nominations.

On the other hand, the new process removes the official role of the committees of jurisdiction, and in doing so, may take some portion of control away from the chairs and other members of the committees over the fate of the nominations. While critics charge that members have too much say over who gets confirmed, members may be concerned about preserving the ability of a committee to have its say on a nomination simply by not acting on it.

Supporters of the resolution might counter that the single objection provision in the rule would take care of this problem. The new process would not apply to a nomination if any Senator objects to it. So, if a committee chair or member felt strongly that a certain nomination needed to have more time and attention devoted to it, he or she could trigger the exemption and the nomination will revert back to the regular confirmation process.

In fact, a Senator desiring to lengthen the regular confirmation process for any nominee to one of these positions could do so by waiting to object to the new process until the nomination had been on the calendar section entitled “Privileged Nominations – Information Received” for nine days of session. The objection would re-start the confirmation process at the beginning, referral to committee, well after the Senate had received the nomination, instead of immediately upon receipt of the nomination.

This failsafe mechanism in the resolution—the ability of one Senator to derail the special process for any nominee—could be both the strength of the resolution and also its weakest point. If, as sponsors believe, the positions included in this group, and the nominations intended to fill them are non-controversial, then the new process could streamline the confirmation process for those nominees, especially if Senators are assured that they retain an ultimate ability to influence the path of any nomination. If, however, any Senator desired to require that any nominee in this group proceed through the regular confirmation process, they can do so, essentially leaving open the question of how effective S.Res. 116 will be as a new procedure. Adoption of the resolution, however, puts the Senate on record as saying it wants to act on these nominations quickly, whatever the process that is followed.

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<sup>55</sup> Information based on the nominations database of the Legislative Information Service of the Library of Congress.

## Appendix A. Positions That No Longer Require Senate Confirmation Under P.L. 112-166

**Table A-1. Positions That No Longer Require Senate Confirmation Under P.L. 112-166**

Positions Listed by Senate Committee of Jurisdiction

<b>Agriculture, Nutrition and Forestry</b>	
Assistant Secretary for Administration, Department of Agriculture	Rural Utilities Service Administrator, Department of Agriculture
Directors (7), Commodity Credit Corporation	
<b>Armed Services</b>	
Members (6), National Security Education Board	Director, Selective Service
<b>Banking, Housing and Urban Affairs</b>	
Administrator, Community Development Financial Institution Fund, Department of the Treasury	Assistant Secretary for Public Affairs, Department of Housing and Urban Development
Members (2), Council of Economic Advisers	
<b>Commerce, Science, and Transportation<sup>a</sup></b>	
Deputy Administrator, Federal Aviation Administration	Chief Scientist, National Oceanic and Atmospheric Administration
Administrator, St. Lawrence Seaway Development Corporation	Assistant Secretary for Budget and Programs, Department of Transportation <sup>b</sup>
<b>Environment and Public Works</b>	
Alternate Federal Co-Chairman, Appalachian Regional Commission	Commissioners (7), Mississippi River Corporation
<b>Finance</b>	
Assistant Secretary for Public Affairs, Department of Treasury	Treasurer of the United States
Assistant Secretary for Management, Department of Treasury <sup>c</sup>	
<b>Foreign Relations</b>	
Assistant Secretary for Public Affairs, Department of State	Assistant Administrator for Management, U.S. Agency for International Development
Assistant Secretary for Administration, Department of State	
<b>Health, Education, Labor and Pensions<sup>d</sup></b>	
Assistant Secretary for Management, Department of Education	Assistant Secretary for Public Affairs, Department of Labor
Commissioner, Education Statistics, Department of Education	Members (15), National Council on Disability
Assistant Secretary for Public Affairs, Department of Health and Human Services	Members (24), National Science Board, National Science Foundation
Managing Directors (2), Corporation for National and Community Service	Members (15), National Board of Education Sciences

Assistant Secretary for Administration and Management, Department of Labor	Members (10), National Institute for Literacy Advisory Board
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Director of the Women's Bureau, Department of Labor	Members (20), National Museum and Library Services Board, National Foundation of the Arts and Humanities
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#### **Homeland Security and Governmental Affairs**

Director, Office of Counternarcotics Enforcement, Department of Homeland Security	Chief Medical Officer, Department of Homeland Security
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Assistant Administrator for Grant Programs, Federal Emergency Management Agency, Department of Homeland Security	Administrator, U.S. Fire Administration, Department of Homeland Security
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#### **Indian Affairs**

Commissioner, Office of Navajo and Hopi Indian Relocation	Members (13), Board of Trustees, Institute of American Indian and Alaska Native Culture and Arts Development
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#### **Judiciary**

Director, Bureau of Justice Statistics, Department of Justice	Deputy Director, Office of National Drug Control Policy, Executive Office of the President
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Director, Bureau of Justice Assistance, Department of Justice	Deputy Director, Demand Reduction, Office of National Drug Control Policy, Executive Office of the President
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Director, National Institute of Justice, Department of Justice	Deputy Director, Supply Reduction, Office of National Drug Control Policy, Executive Office of the President
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Director, Office for Victims of Crime, Department of Justice	Deputy Director, State, Local, and Tribal Affairs, Office of National Drug Control Policy, Executive Office of the President
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Administrator, Office of Juvenile Justice and Delinquency Prevention, Department of Justice	
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#### **Veterans' Affairs**

Assistant Secretary for Management, Department of Veterans Affairs	Assistant Secretary for Operations, Security, and Preparedness, Department of Veterans Affairs
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Assistant Secretary for Human Resources and Administration, Department of Veterans Affairs	Assistant Secretary for Public and Intergovernmental Affairs, Department of Veterans Affairs
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**Source:** Congressional Research Service, based upon the lists provided in the *Congressional Record* upon its introduction (*Congressional Record*, vol. 157, part 44 (March 30, 2011), pp. 1985-1990). Changes made in committee markup were identified through *Congressional Quarterly* and are available at <http://www.cq.com/pdf/3852080>. Committee jurisdiction was determined based upon the list provided in the *Congressional Record* upon the bill's introduction, as well as examination of past referrals of nominations in the Legislative Information System's nominations database.

**Notes:** In addition to eliminating advice and consent requirements for the positions listed here, P.L. 112-166 also made some other changes. In the Department of Defense, the authorized number of Assistant Secretaries was reduced from 16 to 14. The two that were eliminated were the Assistant Secretary of Defense for Networks and Information Integration and the Assistant Secretary of Defense for Public Affairs. Within 180 days of the enactment of P.L. 112-166, the Secretary of Defense will be required to report to the appropriate congressional committees his plan for establishing positions that would fulfill the functions of those two Assistant Secretary positions, but they could not be subject to Senate confirmation or at the Assistant Secretary level. Additionally, for the positions of Governor and Alternate Governor for the African Development Bank, Asian Development Bank, and African Development Fund, the President can nominate an individual with the advice and consent of the Senate, or he can designate an individual to fill those positions from among individuals serving in positions that are already, independently, subject to advice and consent of the Senate.

- a. An additional 319 National Oceanic and Atmospheric Administration Officer Corps positions were typically referred to the Committee on Commerce, Science, and Transportation. These were included in P.L. 112-

166 and will no longer be considered by the Senate. The Senate sometimes considered nominations for the NOAA Officer Corps *en bloc*, or in a list that receives a single vote.

- b. It appears that the Assistant Secretary for Budget and Programs also serves as the CFO in the Department of Transportation. P.L. 112-166 eliminated the advice and consent requirement for the Assistant Secretary position, but the CFO position will still require advice and consent. The CFO position for Transportation was included in S.Res. 116.
- c. It appears that the Assistant Secretary for Management also serves as the CFO in the Department of the Treasury. P.L. 112-166 eliminated the advice and consent requirement for the Assistant Secretary position, but the CFO will still require advice and consent. The CFO position for Treasury was included in S.Res. 116.
- d. An additional 2,536 Public Health Service Officer Corps positions had their advice and consent requirements eliminated by P.L. 112-166. These nominations were typically non-controversial and usually were considered by the Senate *en bloc*, with the Senate considering a large number of nominees and casting a single vote for the entire list. The list typically included dozens or even hundreds of nominees.



## Appendix B. Privileged Nominations, S.Res. 116

**Table B-1. Positions Included in New Senate Confirmation Process Under S.Res. 116,  
As Approved by the Senate on June 29, 2011**

Positions Listed by Senate Committee of Jurisdiction

<b>Agriculture, Nutrition and Forestry</b>	
Assistant Secretary for Congressional Relations, Department of Agriculture	Chief Financial Officer, Department of Agriculture
Members (5), Board of Directors, Federal Agricultural Mortgage Corporation	
<b>Armed Services</b>	
Assistant Secretary for Legislative Affairs, Department of Defense	Assistant Secretary of the Air Force for Financial Management/Comptroller
Chief Financial Officer, Department of Defense <sup>a</sup>	Assistant Secretary of the Army for Financial Management/Comptroller
Assistant Secretary of the Navy for Financial Management/Comptroller	
<b>Banking, Housing and Urban Affairs</b>	
Chief Financial Officer, Department of Housing and Urban Development <sup>b</sup>	Assistant Secretary for Congressional and Intergovernmental Relations, Department of Housing and Urban Development
Members (6), Board of Directors, National Institute of Building Sciences	Members (3), Board of Directors, National Consumer Cooperative Bank
Directors (5), Securities Investor Protection Corporation	
<b>Commerce, Science and Transportation</b>	
Chief Financial Officer, National Aeronautics and Space Administration	Assistant Secretary for Governmental Affairs, Department of Transportation
Assistant Secretary for Legislative Affairs, Department of Commerce	Chief Financial Officer, Department of Transportation
Chief Financial Officer, Department of Commerce <sup>c</sup>	Members (3), Board of Directors, Metropolitan Washington Airport Authority
Assistant Secretary for Administration, Department of Commerce <sup>c</sup>	Members (5), Advisory Board, St. Lawrence Seaway Development Corporation
<b>Energy and Natural Resources</b>	
Chief Financial Officer, Department of Energy <sup>d</sup>	Assistant Secretary for Congressional and Intergovernmental Affairs, Department of Energy
Chief Financial Officer, Department of the Interior <sup>e</sup>	Federal Coordinator, Alaska Natural Gas Transportation Projects
<b>Environment and Public Works</b>	
Members (9), Board of Trustees, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation	Chief Financial Officer, Environmental Protection Agency <sup>f</sup>
<b>Finance</b>	
Deputy Under Secretary/Assistant Secretary for Legislative Affairs, Department of Treasury	Chief Financial Officer, Department of Treasury

Member (7), Board, Internal Revenue Service Oversight	Members (2), Board of Trustees, Federal Hospital Insurance Trust Fund
Member (2), Board of Trustees, Federal Old Age and Survivors Fund	Members (2), Board of Trustees, Federal Supplemental Medical Insurance Trust Fund
Members (3), Advisory Board, Social Security	

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#### **Foreign Relations**

Assistant Secretary for Legislative Affairs, Department of State	Members (8), Board of Directors, Overseas Private Investment Corporation
Chief Financial Officer, Department of State <sup>g</sup>	Assistant Administrator for Legislative and Public Affairs, U.S. Agency for International Development
Chairman, Advisory Board for Cuba Broadcasting	Members (8), Advisory Board for Cuba Broadcasting
Members (7), Board of Directors, African Development Foundation	Commissioners (7), U.S. Advisory Commission on Public Diplomacy
Members (9), Board of Directors, Inter-American Foundation	Members (4), Board of Directors, Millennium Challenge Corporation
Members (15), National Peace Corps Advisory Council	

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#### **Health, Education, Labor and Pensions**

Chief Financial Officer, Department of Education <sup>h</sup>	Chief Financial Officer, Department of Labor <sup>i</sup>
Assistant Secretary for Legislation and Congressional Affairs, Department of Education	Assistant Secretary for Congressional and Intergovernmental Affairs, Department of Labor
Commissioner, Rehabilitation Services Administration, Department of Education	Assistant Secretary for Legislation, Department of Health and Human Services
Chief Financial Officer, Department of Health and Human Services <sup>j</sup>	Commissioner, Administration for Children, Youth, Families, Department of Health and Human Services
Members (15), Corporation for National and Community Service	Members (26), National Council on the Humanities
Chairman, Board of Directors, U.S. Institute of Peace	Vice Chairman, Board of Directors, U.S. Institute of Peace
Members (10), Board of Directors, U.S. Institute of Peace	Members (8), Board of Trustees, Goldwater Scholarship
Members (8), Board of Trustees, Truman Scholarship	Members (6), Board of Trustees, Madison Fellowship
Members (11), Board of Directors, Legal Services Corporation	Members (18), National Council on the Arts

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#### **Homeland Security and Governmental Affairs**

Chief Financial Officer, Department of Homeland Security	Controller, Office of Federal Financial Management, Office of Management and Budget
Members (5), Boards, Federal Retirement Thrift Investment	

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#### **Indian Affairs**

Commissioner, Administration for Native Americans, Department of Health and Human Services

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#### **Judiciary**

Assistant Attorney General for Legislative Affairs, Department of Justice	Members (11), Board of Directors, State Justice Institute
Members (2), Foreign Claims Settlement Commission	

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### Veterans' Affairs

Assistant Secretary for Congressional and Legislative Affairs, Department of Veterans Affairs

Chief Financial Officer, Department of Veterans Affairs<sup>k</sup>

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**Source:** Congressional Research Service, using the list provided in the *Congressional Record* by the bill's sponsors upon its introduction.

**Notes:** The adoption of S.Res. 116 created expedited confirmation procedures for agency CFOs. Under current law, the President may nominate an individual to serve as CFO with the advice and consent of the Senate, or he may choose someone in the agency who has already received advice and consent for another position to serve as CFO (31 U.S.C. §901(a)(1)). Some agencies have a stand-alone CFO, while others combine the CFO position with another position, such as an Assistant Secretary. In the cases of Assistant Secretary positions that are typically combined with the CFO position, some of those Assistant Secretary positions will still be subject to regular Senate confirmation procedures, while others will not. CRS attempted to present the CFO positions as they are typically used within each agency. If a single CFO position is listed, it is usually either a stand-alone position or it is usually held by an Assistant Secretary that would not have its confirmation procedure altered. If an Assistant Secretary position and a CFO position are listed together in the table, both positions would be subjected to the new confirmation procedure. Footnotes throughout the table provide specific details for these positions.

- a. The CFO position at the Department of Defense is currently held by the Under Secretary of Defense (Comptroller). It is unclear how the Senate confirmation process would work for CFO nominees who are also nominated to a regular advice and consent position.
- b. The CFO position at the Department of Housing and Urban Development currently appears to be a stand-alone position.
- c. The positions of CFO and Assistant Secretary for Administration at the Department of Commerce are typically held by the same individual. Both positions are included in S.Res. 116.
- d. In the Department of Energy, the CFO position currently appears to be a stand-alone position.
- e. The Department of the Interior's CFO functions appear to be carried out by the Assistant Secretary for Management and Budget. It is unclear how the Senate confirmation process would work for CFO nominees who are also nominated to a regular advice and consent position.
- f. The CFO position at the Environmental Protection Agency currently appears to be a stand-alone position.
- g. It appears that in recent years, the same individual has been separately and simultaneously nominated for the positions of CFO and the Assistant Secretary for Resource Management at the Department of State. It is unclear how the Senate confirmation process would work for CFO nominees who are also nominated to a regular advice and consent position.
- h. The CFO in the Department of Education currently appears to be treated as a stand-alone position.
- i. The CFO in the Department of Labor currently appears to be treated as a stand-alone position.
- j. According to the Department of Health and Human Services' website, the CFO functions at HHS are carried out by the Assistant Secretary for Resources and Technology, which is sometimes referred to in the department as the Assistant Secretary for Financial Resources. It is unclear how the Senate confirmation process would work for CFO nominees who are also nominated to a regular advice and consent position.
- k. The most recently confirmed individual to this position also served as Assistant Secretary for Management, a position that had its advice and consent requirement eliminated by P.L. 112-166.

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